

46905
EB

SERVICE DATE – MAY 17, 2019

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35692

EASTSIDE COMMUNITY RAIL, LLC—ACQUISITION AND OPERATION
EXEMPTION—GNP RLY INC.

Docket No. FD 35730

BALLARD TERMINAL RAILROAD COMPANY, L.L.C.—LEASE EXEMPTION—
EASTSIDE COMMUNITY RAIL, LLC

Digest:¹ This decision denies a request to reconsider a prior decision in which the Board declined to revoke the acquisition exemption of Eastside Community Rail, LLC, and the lease exemption of Ballard Terminal Railroad Company, L.L.C.

Decided: May 16, 2019

On July 12, 2018, Snohomish County, Wash. (the County), a noncarrier, filed petitions to revoke the exemption of Eastside Community Rail, LLC (ECR), to acquire and operate, and the exemption of Ballard Terminal Railroad Company, L.L.C. (Ballard), to lease a 14.45-mile line of railroad known as the Eastside Corridor, which extends from milepost 23.80 in Woodinville, Wash., to milepost 38.25 in Snohomish, Wash. (the Line). The County claimed that the verified notices of ECR and Ballard contained materially false and misleading information about ECR's property interests in an easement over the Line and were therefore void ab initio.

In a decision served on December 13, 2018 (Decision), the Board denied the County's petitions to revoke because they were based on disputed claims concerning ECR's property interests in the Line that should be addressed by an appropriate court. On February 4, 2019, the County filed a petition for reconsideration, alleging material error in the Decision.² The Board did not receive a response to this petition from any party. For the reasons stated below, the Board will deny the County's petition for reconsideration.

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² A petition for reconsideration was initially due by January 2, 2019. Because of the partial shutdown of the Federal government from December 22, 2018, through January 25, 2019, that deadline was extended to February 4, 2019. See Filings Submitted or Due to Be Submitted During the Partial Fed. Gov't Shutdown, EP 751 (STB served Jan. 28, 2019).

BACKGROUND

On December 18, 2009, BNSF Railway Company (BNSF) sold the physical assets of the Line to the Port of Seattle (the Port) and conveyed a permanent freight rail easement for the Line (the Easement) to GNP RLY Inc. (GNP). (See Snohomish Cty. Pet. to Revoke, Stowe Decl. 5-6, Exs. 1, 11.)³ The Port later sold the physical assets of two segments of the Line—one to the County and one to the City of Woodinville, Wash. See Snohomish Cty., Wash.—Pet. for Declaratory Order, FD 35830 (STB served Mar. 5, 2015); City of Woodinville, Wash.—Pet. for Declaratory Order, FD 35905 (STB served Oct. 7, 2015).

On or about January 24, 2011, Douglas Engle (Engle) signed a deed (the January 2011 Deed) purporting to transfer the Easement from GNP to Earl Engle and Joanne Engle. (Snohomish Cty. Pet. to Revoke, Stowe Decl., Ex. 2; Engle Comment 3, 5, Aug. 14, 2018, FD 35692.) No Board authority was sought or obtained for this purported transfer. According to the County, at the time of the purported transfer, GNP was owned in equal parts by Engle, who was GNP's chief financial officer and treasurer, and Thomas Payne, who was its chief operations officer and chairman. (Snohomish Cty. Pet. to Revoke, Stowe Decl., Ex. 4 at 39.)

On February 2, 2011, creditors sued GNP in the U.S. Bankruptcy Court for the Western District of Washington (the Bankruptcy Court). Despite having executed agreements appearing to convey the Easement to Earl Engle and Joanne Engle in the January 2011 Deed, Engle described the Easement as a current asset of GNP in a sworn declaration dated February 10, 2011, and filed with the Bankruptcy Court. (Snohomish Cty. Pet. to Revoke., Stowe Decl., Ex. 8 at 118, 126.)

On September 5, 2012, GNP's bankruptcy trustee and Engle, as ECR's manager, entered into an agreement for ECR to purchase the assets of GNP (the Asset Purchase Agreement), which purported to include the Easement. (Snohomish Cty. Pet. to Revoke, Stowe Decl., Ex. 5 at 63, 70-71; Engle Comment, Ex. 2, Sept. 21, 2018, FD 35692.) On September 27, 2012, the Bankruptcy Court approved the agreement to transfer GNP's assets to ECR under federal bankruptcy law. (Snohomish Cty. Pet. to Revoke, Stowe Decl., Ex. 4.)

On November 7, 2012, ECR filed in Docket No. FD 35692 a verified notice of exemption to acquire the Line (i.e., the Easement) from GNP and operate it. (ECR Notice, Nov. 7, 2012, FD 35692.) The exemption became effective on December 7, 2012, (77 Fed. Reg. 70,207), and ECR closed on its acquisition of GNP's assets on December 17, 2012, (Snohomish Cty. Pet. to Revoke, Stowe Decl., Ex. 5 at 71; Engle Comment, Ex. 2, Sept. 21, 2018).

³ The County's petition to revoke in Docket No. FD 35730 incorporates the petition to revoke submitted in Docket No. FD 35692 in its entirety. All page references to the County's petition to revoke are to the filing in Docket No. FD 35692.

On April 2, 2013, Ballard filed in Docket No. FD 35730 a verified notice of exemption for authority to lease the Easement from ECR and operate it. (Ballard Notice, Apr. 2, 2013, FD 35730.) That exemption became effective on May 2, 2013. (78 Fed. Reg. 23,331.)

In its 2018 petitions to revoke ECR's and Ballard's exemptions, the County claimed that the verified notices were void ab initio under 49 C.F.R. §§ 1150.32(c) and 1150.42(c) because the notices falsely stated that ECR had acquired the Easement from GNP, when in fact the Easement had been conveyed to Earl Engle and Joanne Engle before ECR acquired GNP's assets in bankruptcy. (Snohomish Cty. Pet. to Revoke 4-5, 16.) In support of its position, the County provided evidence that the January 2011 Deed was recorded in Snohomish County on January 25, 2011. (*Id.* at 10-11, Stowe Decl., Ex. 2.) The County argued that, because this purported transfer occurred prior to the bankruptcy, GNP lacked a property interest in the Easement to transfer to ECR through the bankruptcy proceeding. (*Id.* at 11-12.)

In response, Engle claimed that the Easement was sold to Earl Engle and Joanne Engle in January 2011, but that they conveyed it back to GNP in October 2011 before the Asset Purchase Agreement was executed. (Engle Comment 3, 5, Aug. 14, 2018.) Therefore, Engle argued that the notices to the Board were materially accurate and not void. (*Id.* at 3.)

As noted above, in December 2018, the Board denied the County's petitions to revoke ECR's operation exemption and Ballard's lease exemption. The Board found that the petitions to revoke turned on issues of federal bankruptcy and state property and contract law that should be resolved by an appropriate court (e.g., whether GNP owned the Easement when ECR filed its verified notice for authority to acquire it and whether, thereafter, ECR owned the Easement when Ballard filed its verified notice for authority to lease it). *Decision*, FD 35692 et al., slip op. at 7. Further, the Board found that, without resolution of these ownership issues, it could not determine whether the verified notices contained false or misleading information. *Id.* at 8.

DISCUSSION AND CONCLUSIONS

A party may seek reconsideration of a Board decision by submitting a timely petition that (1) presents new evidence or substantially changed circumstances that would materially affect the prior decision; or (2) demonstrates material error in the prior decision. 49 U.S.C. § 1322(c); 49 C.F.R. § 1115.3. In a petition alleging material error, a party must do more than simply make a general allegation; it must substantiate its claim of material error. *See Canadian Pac. Ry.—Control—Dakota, Minn. & E. R.R.*, FD 35081, slip op. at 4 (STB served May 7, 2009). No matter which type of reconsideration claim is presented, the alleged grounds must be sufficient to convince the Board that its prior decision in the case would be materially affected in order for reconsideration to be granted. *See Montezuma Grain Co. v. STB*, 339 F.3d 535, 541-42 (7th Cir. 2003); *Canadian Nat'l Ry.—Control—EJ&E West Co.*, FD 35087 (Sub-No. 8), slip op. at 4 (STB served Dec. 21, 2018); 49 C.F.R. § 1115.3.

Here, the County argues that the Board committed material error by failing to find that ECR's acquisition exemption and Ballard's lease exemption were void ab initio.⁴ (Pet. for Recons. 7.) The County claims to have proven that ECR's and Ballard's representations that the Easement transferred to ECR through the bankruptcy court proceeding were false and misleading. (*Id.* at 1-2.) As the County states in its petition for reconsideration, "the issue is what ECR received from the federal bankruptcy court" (*Id.* at 7.) However, determining what property was transferred through the bankruptcy court proceeding, as the County urges the Board to do in this case, is precisely the type of issue best left to the courts.

The County claims it is "incontrovertible that the bankruptcy trustee never issued a deed to ECR" and in fact "could not because . . . record title resides in [Earl Engle and Joanne Engle]." (Pet. for Recons. 1-2.) However, numerous questions exist about what property interests, if any, were validly conveyed in each of the transactions purporting to transfer the Easement both before and during the bankruptcy court proceeding, such as: (1) whether Engle had the unilateral authority to convey the Easement from GNP to Earl Engle and Joanne Engle in January 2011; (2) whether, if the January 2011 Deed was valid, the Easement was transferred back to GNP prior to the close of the bankruptcy court proceeding, as Engle claims; and (3) whether GNP's trustee avoided the pre-bankruptcy transfer of the Easement, as he was authorized to do under 11 U.S.C. § 547.

As the Board explained in the *Decision*, FD 35692 et al., slip op. at 7, disputes concerning federal bankruptcy and state property and contract law should be decided by the appropriate courts. *See Gen. Ry.—Exemption for Acquis. of R.R. Line—in Osceola & Dickinson Ctys., Iowa*, FD 34867, slip op. at 4 (STB served June 15, 2007); *Lackawanna Cty. R.R. Auth.—Acquis. Exemption—F&L Realty, Inc.*, FD 33905 et al., slip op. at 6 (STB served Oct. 22, 2001).⁵ The question of regulatory authority under the Interstate Commerce Act (ICA), as amended by the ICC Termination Act of 1995 (ICCTA), is separate from the question of whether the relevant parties have the necessary state law property interests or contractual rights to act on the authority granted by the Board. *See Decision*, FD 35692 et al., slip op. at 7-8; *Lackawanna Cty.*, FD 33906, slip op. at 6. The Board's grant of authority is permissive—whether the parties have regulatory authority to acquire or operate over a certain segment of

⁴ An exemption is void ab initio if (1) the verified notice contains false or misleading information (by assertion or omission), and (2) the false or misleading information is material. *See* 49 C.F.R §§ 1150.32(c), 1150.42(c); *Ohio River Partners LLC—Acquis. & Operation Exemption—Hannibal Dev., LLC*, FD 35984, slip op. at 3 (STB served Apr. 1, 2016). The party seeking revocation or rejection of a notice of exemption has the burden of demonstrating that the notice contains false or misleading information. *See Gen. Ry.—Exemption for Acquis. of R.R. Line—in Osceola & Dickinson Ctys., Iowa*, FD 34867, slip op. at 4 (STB served June 15, 2007).

⁵ *See also Ohio River Partners LLC—Acquis. & Operation Exemption—Hannibal Dev., LLC*, FD 35984 et al., slip op. at 6 (STB served Dec. 22, 2017); *Allied Indus. Dev. Corp.—Pet. for Declaratory Order*, FD 35477, slip op. at 5 (STB served Sept. 17, 2015); *V&S Ry.—Pet. for Declaratory Order—R.R. Operations in Hutchinson, Kan.*, FD 35459, slip op. at 7 (STB served July 12, 2012); *Allegheny Valley R.R.—Pet. for Declaratory Order—Fiore*, FD 35388, slip op. at 3-4 (STB served Apr. 25, 2011).

track is different from the question of whether that party (or parties) have the necessary property interest or contractual right to exercise that authority. Thus, the Board is not the appropriate forum to resolve bankruptcy, property, or contract law disputes, such as the ownership issues raised here, and without resolution of those issues, the Board cannot determine whether the verified notices contained false or misleading information. Decision, FD 35692 et al., slip op. at 8.

The County expresses concern that the Board's Decision "directs the County to seek relief that a state court cannot grant due to the agency's preemptive rail license." (Pet. for Recons. 3.) The County, however, misunderstands the Decision. In its Decision, the Board held that the County challenged the ownership of the Easement, and it is that question of ownership that must be addressed by an appropriate court. Indeed, the County's petitions to revoke could be considered a collateral challenge to the bankruptcy court's September 27, 2012, order authorizing the transfer of GNP's assets to ECR. Under the circumstances of this case, it would therefore be inappropriate for the Board to entertain a petition that, if granted, would call the finality of the bankruptcy court's decision into question.

In this case, the courts are not precluded from settling the dispute over the Easement's ownership.⁶ A rail carrier authorized under the ICA, as amended by ICCTA, cannot be removed from a rail line that is part of the interstate rail system without the Board's permission. See Thompson v. Tex. Mexican Ry., 328 U.S. 134, 144 (1946). However, once the question of Easement ownership has been resolved by a court, if the County still wishes to seek revocation of the licenses granted by the Board, the County may come back to the Board to seek such relief.⁷ While the courts are preempted from providing the ultimate relief the County seeks (i.e., ejectment) unless and until the Board revokes the authority it granted, the Board specifically stated in its Decision, FD 35692 et al., slip op. at 8, that it was denying the County's petitions without prejudice to any party that wishes to file a future petition to revoke once the questions of ownership have been resolved.

For these reasons, the County has failed to demonstrate material error. Accordingly, the County's petition for reconsideration will be denied.

It is ordered:

1. The County's petition for reconsideration is denied.

⁶ None of the County's arguments regarding impediments to a particular litigation strategy, such as lack of standing or barriers to bringing a trespass action, affect the conclusion that the Board is not the proper forum for litigating property rights issues.

⁷ If, for example, a court were to determine that the Easement was not validly conveyed to Earl Engle and Joanne Engle in the January 2011 Deed and, therefore, it was a GNP asset that could be conveyed in the bankruptcy proceeding, ECR's and Ballard's current existing service obligations and operating rights would remain in effect until the Board either approves a new transfer of those obligations and rights or permits discontinuance. See, e.g., Ark. & Mo. R.R. v. Mo. Pac. R.R., 6 I.C.C.2d 619, 622 (1990).

2. This decision is effective on its service date.

By the Board, Board Members Begeman, Fuchs, and Oberman.